LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
SEP 21 1962
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 304

IN RE: ESTATE OF LEETHA H. GEER, DECEASED

FRED S. GEER, EXECUTOR OF THE ESTATE OF LEETHA H. GEER, DECEASED AND FRED S. GEER, INDIVIDUALLY,
Appellants,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLANTS OPPOSING MOTON TO DISMISS.

MARK MCELROY,
Attorney General of Ohio.
THEODORE R. SAKER,
First Assistant Attorney General,
JOSEPH L. WHITE,
Assistant Atforney General,
State House Annex,
Columbus 15, Ohio,
Attorneys for Appellee.

H. HERSCHEL HUNT,
1509 Central Tower,
Youngstown 3, Ohio,
Attorney for Appellants.

INDEX

	Page
Statement opposing Motion to Dismiss	1
Amendment to Statute creates a conclusive presumption	3
Conclusion	5

AUTHORITIES

Evans, In re Estate, 173 Ohio St., 132; 180 N.E.2d, 827	
Heiner v. Donnan, 285 U.S., 312	1, 2, 3
Hooper v. Wisconsin, 284 U.S., 206	3
Schlesinger v. Wisconsin, 270 U.S., 230	3

STATUTE

Ohio Revised Code, Section 5731.02(E)	1, 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 304

IN RE: ESTATE OF LEETHA H. GEER, DECEASED

FRED S. GEER, EXECUTOR OF THE ESTATE OF LEETHA H. GEER, DECEASED AND FRED S. GEER, INDIVIDUALLY,

Appellants,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee

BRIEF OF APPELLANTS OPPOSING MOTON TO DISMISS

Appellee states that Appellants are seeking to review the *unanimous decisions* of the Supreme Court of Ohio which dismissed their Appeal as of Right, and overruled their Motion to Certify the Record.

It was previously pointed out on page 16 of the Jurisdictional Statement, in *Re Estate of Evans*, 173, Ohio St., 132; 180 N.E. 2d, 827, which was decided by the Supreme Court of Ohio on February 28, 1962, in which the constitutionality of Revised Code, Section 5731.02(E) was upheld, the Ohio Supreme Court decided the Geer case on March 21, 1962, obviously on the ground that they had decided the same question in the Evans case.

Appellee, is in error in stating this was a unanimous

decision of the Supreme Court. Judge Taft wrote a comprehensive dissenting opinion in the Evans case which is set out in the report of said case, and it will be noted from the report of the Geer case that while Judge Taft did not specifically dissent, he did not concur in the decision on the Appeal as of Right.

Appellee further states that this Amendment was instituted by the Ohio Probate Code Committee of the Ohio Judges' Association.

This Court is entitled also to be informed that when this Amendment was proposed, it was thought by many at least to do nothing more or less than to make statutory a rule promulgated by the Tax Commissioner of Ohio which had been in force for many years. This rule provided that joint and survivorship accounts between husband and wife should be taxed at one-half of their total value, unless evidence was introduced showing the contributions, if any, of each: in which case, only the contribution of the decedent was taxable.

The probate courts took different views on the interpretation of this Amendment. In the *Evans* case, the report shows that the Probate Court of Allen County held that the joint and survivorship bonds were the sole property of the survivor and non-taxable. The Court of Appeals reversed the Probate Court, and the Supreme Court of Ohio affirmed the Court of Appeals.

The Probate Court of Trumbull County in the *Kaski* case (not reported) also held that joint and survivorship bonds which were the sole property of the survivor were not subject to the tax. The Court of Appeals reversed this decision which was not carried further. While in this case, the Probate Court held the funds which were found to be the sole property of Fred S. Geer were subject to tax to the extent of one-half thereof.

The Amendment in 1957 to Revised Code, Section 4731.02 (E) Creates a Conclusive Presumption in Violation of the Constitution of the United States.

In support of the Motion to Dismiss, Appellee cites a great many cases from community property and common law states. We believe that such cases have no application to the rights of husband and wife in Ohio. Ohio is neither a common law state nor a community property state, but by statute as shown in the Jurisdictional Statement, (pages 11 and 12) husband and wife have no interest in each others property, and may contract with each other or third persons as if unmarried.

The Supreme Court of Ohio, in the previous case, *In re, Estate of Evans*, 173 Ohio St., 132, in its opinion made no reference to the question of a conclusive presumption. However, it did specifically hold that under this amendment property which was found to be the sole property of the survivor was subject to tax to the extent of 50% of its value, which necessarily means that this presumption was not rebuttable regardles of the facts.

The interpretation of a state statute by the highest court of the state is binding upon this court. If this interpretation is in violation of the Constitution of the United States, the statute is invalid.

This Court has consistently held that a conclusive presumption created by statute is invalid whether it be treated as a rule of evidence or of substantive law. *Schelsinger v. Wisconsin*, 270 U.S., 230; *Heiner v. Donnan*, 285 U.S., 312.

In *Hooper v. Tax Commissioner of Wisconsin*, 284 U.S., 206 the Syllabus is as follows:

> "1. A Wisconsin income tax statute which authorizes an assessment against a husband of a tax computed on the combined total of his and his wife's income

and augmented by surtaxes resulting from the combination, although under the laws of the State the husband has no interest in or control over the property or income of his wife, held violative of the due process and equal protection clauses of the Fourteenth Amendment. P. 215.

"2. The statute as so applied cannot be justified either as necessary to prevent frauds and evasions or, since it is essentially a revenue measure, as a regulation of the marriage relation." Pp. 216, 217, 202 Wisc. 493; 233 N.W. 100 reversed."

We submit that the attempted classification of this Amendment as to husband and wife is arbitrary and has no basis in fact or experience.

Prior to this Amendment there was no distinction in the Statute as to joint and survivorship property held by anyone. It was only the "enhanced value"; or, in other words the portion owned by the decedent that was taxable, whether husband and wife or otherwise. We believe that there is no justifiable inference that property held jointly by the husband and wife is actually owned one-half by the husband and one-half by the wife. This is supported by many decisions of the Supreme Court of Ohio, some of which are set forth in the Jurisdictional Statement under "Contract between the Depositors themselves" (pages 8 to 11), the substance of which is that the actual ownership between the parties themselves must be determined and each case must rest upon its own particular facts.

Under the Ohio succession tax the right to succeed is the basis of the right. A person cannot succeed to that which he already owns. If there is no succession, there can be no right to succeed and no tax. This is true regardless of whether the joint owners are husband and wife or

anyone else, related or otherwise. While there may be justification for a different classification between husband and wife as to exemptions or rate of tax, etc., in this situation we believe there is no sound basis for this attempted classification, and, therefore, said classification on its face is arbitrary, discriminatory and in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Conclusion

Appellants respectfully contend that Section 5731.02(E), Ohio Revised Code, violates the due process clause of the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

That said section is repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution.

That said section impairs the obligation of the joint and survivorship contract between husband and wife as to said accounts and is in violation of Article I, Section 10 of the United States Constitution.

WHEREFORE, Appellants respectfully pray that the Motion to Dismiss be overruled, and jurisdiction noted.

Respectfully submitted,

H. HERSCHEL HUNT,
1509 Central Tower,
Youngstown 3, Ohio,
Attorney for Appellants.